United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

ORIGINAL

74-2382

To Be Argued by
HERMAN E. COOPER

United States Court of Appeals

FOR THE SECOND CIRCUIT

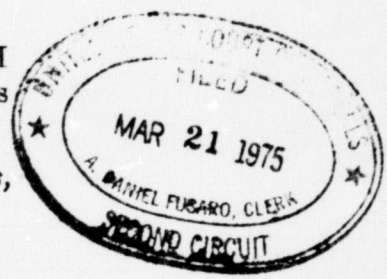
JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants,

—against—

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN, MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees.



On Appeal From the United States District Court For the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT-APPELLEE, LEON KARCHMER

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PRELIMINARY STATEMENT

This is the Reply Brief of Leon Karchmer, submitted in response to the main brief of Plaintiffs-Appellees-Appellants.

ARGUMENT

POINT I

The Fact that the Pension Fund and the Trustees Must Have Separate Counsel Does Not Mean that the Trustees Cannot Be Indemnified for their Counsel Fees.

Plaintiffs confuse two concepts. They argue in Point I of their main brief that, in this case, the Pension Fund and the trustees could not have been represented by the same attorney since the interests of each might have differed. Plaintiffs spend five pages on this argument. At page 14 of their main brief, plaintiffs even analogize this case to a stockholder's derivative suit, and they cite cases which hold that the same counsel should not represent both the corporation and the defendant directors of the corporation.

But none of this relates to the issues here. No one contends that the same counsel should have represented both the trustees and the Pension Fund. In fact, since one trustee was held surchargeable and the other two were not, the same counsel should not even represent all the trustees. This is quite clear and conceded. It does not, however, mean that the trustees are precluded from obtaining counsel fees.

Plaintiffs completely ignore the abundant citations, in Karchmer's main brief, holding that a trustee is entitled to have his counsel fees paid if he prevails in the attack against him. Holdeman v. Sheldon, 204 F. Supp. 890, 895 (S.D.N.Y. 1962) aff'd. 311 F. 2d 2, 3 (2d Cir. 1962). Highway Truck Drivers and Helpers Local 107 v. Cohen, 284 F. 2d 162, 164 (3rd Cir. 1960). Koonice v. Gaier, 320 F. Supp. 1321, 1323-24 (S.D.N.Y. 1971). These cases are not discussed at all, yet they are the leading cases on this very point.

Plaintiffs not only fail to distinguish any of these cases, they do not even consider most of the other cases in the briefs of Karchmer and Segal. The quote plaintiffs cite at page 21 of their brief, from the Cohen litigation, merely determined that the defendant trustees could not have counsel fees paid prior to exoneration. We are now past that stage. Exoneration has occurred. Cohen, Holdeman, and Koonice all establish that where a defendant "is successful in his defense, or perhaps even where his actions were based on a reasonable judgment as to appropriate procedures and do not evidence bad faith," indemnification is appropriate and permissible. 311 F. 2d at 3.

Indeed, even in stockholder derivative cases, which plaintiffs cite to support their first argument, the law in many jurisdictions is that the exonerated director may have his expenses paid, including counsel fees. See, e.g., N.Y. Bus. Corp. L. § 722.

Plaintiffs do not discuss the cases permitting indemnification because the cases are clearly against them. The courts permit indemnification when there is no wrongdoing proved. Whether or not it is concluded that Karchmer was negligent in paying Perry, the exoneration clause, freely agreed to by the union and the trustees, absolved that negligence. By agreeing to an exoneration clause in order to induce Karchmer to be a trustee, the union agreed not to punish the trustee for alleged negligence. The courts should not undermine that understanding.*

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*Plaintiffs skirt the issue of whether defendants violated Judge Bonsal's order forbidding their counsel to be paid with union funds. Judge Bonsal didn't think so (App. II, p. 79a) and the effort to punish defendants for contempt is not being pushed on appeal.

POINT II

Plaintiffs Arguments in Points II and III of Their Brief, Relating to Indemnification of Freedman's Counsel Fees, Should Not Divert the Court's Attention From the Real Issues in This Case.

In two Points, plaintiffs argue that Freedman is not entitled to reimbursement of his counsel fees. This argument can only have been inserted to deflect attention from the real issues on appeal. Judge Bonsal expressly found that "Mr. Freedman has paid his own legal expenses arising out of this litigation." (App. II, p. 152a.) Plaintiff cites to no portion of the record which would indicate that this conclusion of Judge Bonsal's is clearly erroneous. Judge Bonsal was intimately familiar with this litigation. His conclusion should prevail.

Freedman is apparently not an appellant here. Apparently, too, the primary reason for plaintiffs' two separate arguments regarding Freedman's counsel fees is to obscure the very different positions of Karchmer and Segal. Only Freedman was found surchargeable for the monies erroneously paid Perry. Karchmer and Segal were exonerated. The Court should not concern itself with Points II and III of plaintiffs' brief.

POINT III

Karchmer was not Negligent and, in any Event, is Entitled to Counsel Fees for Successfully Establishing His Non-Liability.

Karchmer continues to rely on the argument, at pages 7-11 of his main brief, that he was not guilty of negligence in paying Mr. Perry. He relied on counsel's advice and on the documents Perry brought to him, indicating that Perry was entitled to the money. The Trust Agreement, itself, supports this reliance on both counsel and the documents.

Plaintiffs do not respond to any of the cases cited in Karchmer's main brief holding that reliance on counsel's advice is, by definition, evidence of good faith and negates a charge of negligence. Mills v. Bluestein, 275 N.Y. 317, 324 (1937). Dill v. Boston Safe Deposit and Trust Co., 343 Mass. 97, 100-101, 175 N.E. 2d at 911, 913 (1961). In re Cowles' Will, 22 App. Div. 2d 365, 378, 255 N.Y.S. 2d 160, 175 (1st Dept. 1965), aff'd. 17 N.Y. 2d 567, 268 N.Y.S. 2d 327 (1966). In re Bishop's Will, 277 App. Div. 108, 115, 98 N.Y.S. 2d 69 (1st Dept. 1950). Weidlich v. Comley, 267 F. 2d 133, 134 (2d Cir. 1959).

In matter of Estricher, 202 Misc. 431 (Surr. Ct., N.Y. Co. 1952), cited by plaintiffs, the Surrogate required the trustee to pay its own counsel fees. But there the trustee was not exonerated under an exculpation clause. The only reason the Court denied the application to revoke the letters of trusteeship was its conclusion that removal would not then be to the best advantage of the estate. There is no indication in the opinion of exactly what the trustee did or failed to do. Likewise, the quote from Scott is taken from a section which does not consider the effect of exculpation clauses. On the contrary, Scott also cites Dill, supra, for the proposition that the result would differ in the face of an exculpation clause or a clause permitting reliance on counsel's advice. Scott on Trusts, Vol. 3, Section 201.

POINT IV

There is No Need for a Hearing on Counsel Fees

Plaintiffs cite City of Detroit v. Grinnell, 495 F. 2d 448 (2d Cir. 1974) for the proposition,

raised here apparently for the first time, that a hearing should be held to determine the proper counsel fee, if any, to be paid by the Pension Fund for representation of Freedman, Karchmer and Segal. This is unnecessary. Judge Bonsal knew the case sufficiently well to make his decision without a hearing. Grinnell did not establish that a hearing is required every time a counsel fee is established in a federal court. Unlike this litigation, the Grinnell litigation had gone on for five years after the conclusion of an earlier, lengthy antitrust proceeding. It involved three classes of plaintiffs and four separate defendants. The issues were exceedingly more complex than the ones here. The final settlement was for ten million dollars. The counsel fee awarded by the lower court was $1.5 million. This court said that "in a case such as this, where there are many vigorous disputes of fact over the elements that comprise the fee award, an evidentiary hearing, complete with cross-examination, is imperative."

This case is a far cry from Grinnell. The issues are simpler, the parties are fewer, and the amount involved is less. This is not "a case such

as" Grinnell. Judge Bonsal was aware of Grinnell when he made his decision without a hearing (App. II, p. 81a). He obviously considered a hearing unnecessary. Plaintiffs have advanced no facts to upset that conclusion.

Finally, it is a little late for plaintiffs to begin asking for a hearing. The record does not indicate that they did so below. They should not be allowed to do so now, after the District Court has already ruled.

Plaintiffs also argue that the trustees did not need three lawyers and so the Pension Fund should not have to pay three lawyers (Point VI). This is a strange argument for plaintiffs to make in light of their earlier vigorous argument that the trustees needed counsel separate from the Fund (Point I) because their interests might differ. The exact same thing is true for the trustees. Each was in a different situation with regard to ultimate liability. Each did and didn't do different things. There was a chance that the non-liability of one might have depended on shifting blame to the others. In fact, as it turned out, one was found liable

and two were exonerated. For the very cases plaintiffs cite, separate counsel were required here.

Finally, plaintiffs are simply wrong in saying there is no basis for the 61% - 39% split (Point V). Mr. Reardon's affidavit (App. II, p. 95a), joined in by appellant Karchmer's counsel (App. II, p. 126a), and accepted by the Court (App. II, p. 149a-151a), amply supports this division.

CONCLUSION

The judgment of the District Court, requiring Leon Karchmer to pay the percentage of his counsel fees attributable to the Perry claim, should be reversed.

Respectfully submitted

HERMAN E. COOPER
Attorney for Defendant
Leon Karchmer

OF COUNSEL:

Stephen Gillers

United States Court of Appeals
for the Second Circuit

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

James M. Morrissey, Joseph Padilla, Ralph Ibrahim, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants

against

Joseph Curran, Shannon Wall et al. Defendants-Appellants-Appellees

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Herman E. Cooper Esq., being duly sworn deposes and says that he is the attorney for the above named Defendant-Appellant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 21st. day of March, 19 75 he served the within

Reply Brief of Defendant-Appellant-Appellee, Leon Karchmer

upon the attorneys for the parties and at the addresses as specified below

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New York, New York

by depositing 3 true copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 21st. day of March, 19 75

Raymond J. Braddock

Robert W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1978